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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

Allstate Vehicle and Property Insurance
Company, an Illinois Corp.,

Plaintiff,

v.

Terry Lopes, individually and doing business
as A Maui Mom Childcare & Pre-School, A
Maui Mom Childcare and Pre-School, LLC,
an Oregon Limited Liability Co., and Gage
Kapon-Ray Geer,

Defendants.

Case No. 3:17-cv-01487

COMPLAINT FOR DECLARATORY
JUDGMENT

Plaintiff, Allstate Vehicle and Property Insurance Company (hereinafter “Allstate”),
by and through its attorneys, Douglas F. Foley of Douglas Foley & Associates, PLLC,
hereby alleges as follows:

1. This action for Declaratory Relief is one in which the United States District
Court is given original jurisdiction by reason of diversity of citizenship and the requisite
amount in controversy exceeds \$75,000 pursuant to Title 28, U.S.C. §1332.

2. Allstate is an Illinois corporation authorized to transact the business of
insurance in the State of Oregon, whose principle place of business is in the State of Illinois.
For purposes of diversity jurisdiction Allstate is deemed to be a citizen of Illinois.

3. Upon information and belief at all times pertinent to this lawsuit, Defendants Terry Lopes, aka as Leina Ala Lopes, and Gage Kapono-Ray Geer are citizens of the State of Oregon.

4. Upon information and belief at all times pertinent to this lawsuit A Maui Mom Childcare, and A Maui Mom Childcare & Preschool, LLC, an Oregon Limited Liability Company, are Oregon business entities that are deemed citizens of the State of Oregon. Defendant Terry Lopes is the Member of A Maui Mom Childcare & Preschool, LLC, and is a citizen of the State of Oregon. A Maui Mom Childcare is an assumed business name registered to Defendant Terry Lopes.

5. Allstate issued a Homeowners Policy to Terry Lopes for the property located at 7600 SW Sage Place, Beaverton, OR 97008, providing certain coverages subject to the terms, definitions, exclusions, limitations, and conditions contained in the insurance contract.

I. UNDERLYING LAWSUIT

6. This declaratory judgment action involves a complaint filed in Multnomah County Circuit Court with allegations of child sexual abuse against Gage Kapono-Ray Geer.

7. The lawsuit is captioned: "*J.B. and A.B., by and through K.B, Guardian Ad Litem of J.B. and A.B. vs. Leina'Ala Lopes, et al.*", Multnomah County Circuit Court. The Complaint is attached as Exhibit 1. The following statement of facts is extracted from the Complaint filed by the Plaintiff in the underlying case. Allstate does not necessarily agree to the veracity of the facts alleged, but recites the following facts for the sole purpose of identifying the issues in dispute in this matter with respect to the coverages provided by Allstate Insurance Company, subject to the terms, definitions, exclusions and conditions of the insurance contract. The underlying Complaint is referenced in the following paragraphs set forth below.

8. The complaint alleges child abuse committed by Gage Kapono Ray Greer. The allegations of the underlying complaint are incorporated by reference and included

herein. The Complaint alleges the following facts that gave rise to J.B.'s injuries, as shown below:

Facts Giving Rise to J. B.'s Injuries

In or about January 2011, J. B. enrolled in Lopes' and MMCP's daycare program at the age of 2 ½ and, as such, was placed in the care, custody and protection of Lopes and MMCP, and each of them. (Complaint ¶9) On numerous occasions between 2011 and 2015, from ages 3 through 6, while J. B. was in the care, custody and protection of Lopes and MMCP, Geer falsely imprisoned, assaulted, battered, invaded J. B.'s privacy, sexually assaulted and negligently inflicted emotional distress upon J. B. during daycare hours. Most incidents of false imprisonment, assault, battery, invasion of privacy, sexual assault, sodomy and negligent infliction of emotional distress took place inside of a single-user bathroom located in the daycare. The aforementioned sexual assault and sodomy, including but not limited to, forcing his penis into J. B.'s mouth, will hereinafter be referred to as the "sexual abuse." All other forms of abuse, including but not limited to, forcefully restraining J. B. or intruding upon J. B. while in the bathroom, will hereinafter be referred to collectively as the "non-sexual misconduct." (Complaint ¶10)

On information and belief, MMCP and Lopes (1) failed to establish, implement, and/or enforce adequate safety rules and policies concerning the supervision of interactions between pupils in the program and either employees, volunteers, residents or guests of the Lopes home; (2) failed to ensure that the facilities and premises- including bathrooms- were safe and/or did not pose a hazard or barrier to the adequate supervision, care and control of pupils; (3) failed to keep all children and employees/volunteers within sight and sound; and (4) failed to adequately train staff and volunteers regarding safety protection protocols to prevent non-sexual misconduct and sexual abuse. (Complaint ¶11)

Similar facts were alleged for A.B., as shown below:

Facts Giving Rise to A. B.'s Injuries

In or about January 2011, A. B. enrolled in Lopes' and MMCP's daycare program at the age of 18 months and, as such, was placed in the care, custody and protection of Lopes and MMCP,

and each of them. (Complaint ¶12) On numerous occasions between 2011 and 2015, from ages 2 through 5, while A. B. was in the care, custody and protection of Lopes and MMCP, Geer falsely imprisoned, assaulted, battered, invaded A. B.'s privacy, sexually assaulted and negligently inflicted emotional distress upon A. B. during day care hours. Most incidents of false imprisonment, assault, battery, invasion of privacy, sexual assault, sodomy and negligent infliction of emotional distress took place inside of single-user bathrooms located both in the daycare. The aforementioned sexual assault and sodomy, including but not limited to, forcing his penis into A. B.'s mouth, will hereinafter be referred to as the "sexual abuse." All other forms of abuse, including but not limited to, forcefully restraining A. B. or intruding upon A. B. while in the bathroom, will hereinafter be referred to collectively as the "non-sexual misconduct." (Complaint ¶13)

On information and belief, MMCP and Lopes (1) failed to establish, implement, and/or enforce adequate safety rules and policies concerning the supervision of interactions between pupils in the program and either employees, volunteers, residents or guests of the Lopes home; (2) failed to ensure that the facilities and premises- including bathrooms- were safe and/or did not pose a hazard or barrier to the adequate supervision, care and control of pupils; (3) failed to keep all children and employees/volunteers within sight and sound; and (4) failed to adequately train staff and volunteers regarding safety protection protocols to prevent non-sexual misconduct and sexual abuse. (Complaint ¶14)

9. The underlying complaint includes claims for negligence, dangerous premises, negligence *Per Se*, false imprisonment, invasion of privacy, negligent infliction of emotional distress, battery, fraud, Abuse of a Vulnerable Person, and Respondeat Superior.

10. Gage Kapon Ray Greer received a criminal conviction in Washington County, State of Oregon CASE NO. C160391CR related to the allegations described in the Multnomah County Circuit Court Complaint. He was convicted on 07/21/2016 of two counts of Attempt to Commit a Class A Felony – Sodomy in the First Degree – Victim Under 12 Years of Age. The Conviction was based on a Guilty Plea entered on 7/21/2016.

II. THE INSURANCE CONTRACT

Allstate issued a Deluxe Homeowners Policy to Terry Lopes for the property located at 7600 SW Sage Place, Beaverton, OR 97008, providing certain coverages subject to the terms, definitions, exclusions, limitations, and conditions contained in said insurance contract. Exhibit 2. The terms of the insurance contract are incorporated by reference and included herein.

“General

Definitions Used In This Policy

Throughout this policy, when the following words appear in bold type, they are defined as follows:

1. **Bodily injury** - means physical harm to the body, including sickness or disease, and resulting death, except that **bodily injury** does not include:

- a) any venereal disease;
- b) herpes;
- c) Acquired Immune Deficiency Syndrome (AIDS);
- d) AIDS Related Complex (ARC);
- e) Human Immunodeficiency Virus (HIV);

or any resulting symptom, effect, condition, disease or illness related to a) through e) listed above.

In addition, **bodily injury** does not include any symptom, effect, condition, disease or illness resulting in any manner from:

- a) lead in any form;
- b) asbestos in any form;
- c) radon in any form; or
- d) oil, fuel oil, kerosene, liquid propane or gasoline intended for, or from, a storage tank located at the **residence premises**.

2. **Building structure** - means a structure with walls and a roof.

3. **Business** - means:

a) any full- or part-time activity of any kind engaged in for economic gain including the use of any part of any premises for such purposes. The providing of home day care services to other than an **insured person** or relative of an **insured person** for economic gain is also a business.

However, the mutual exchange of home day care services is not considered a **business**;

b) the rental or holding for rental of property by an **insured person**. Rental of **your residence premises** is not considered a **business** when:

- 1) it is rented occasionally for residential purposes;
- 2) a portion is rented to roomers or boarders provided not more than two roomers or boarders reside on the **residence premises** at any one time; or
- 3) a portion is rented as a private garage.

4. **Dwelling** - means the single-family **building structure**, identified as the insured property on the Policy Declarations, where **you** reside and which is principally used as a private residence.

5. **Insured person(s)** - means **you** and, if a resident of **your** household:

- a) any relative; and
- b) any person under the age of 21 in **your** care.

Under **Family Liability Protection–Coverage X and Guest Medical Protection–Coverage Y**, “**insured person**” also means:

- a) any person or organization legally responsible for loss caused by animals or watercraft covered by this policy which are owned by an **insured person**. We do not cover any person or organization using or having custody of animals or watercraft in any **business**, or without permission of the owner.
- b) with respect to the use of any vehicle covered by this policy, any person while engaged in the employment of an **insured person**.

6. **Insured premises** - means:

- a) the **residence premises**; and
- b) under **Section II** only:

1) the part of any other premises, other structures and grounds used by **you** as a residence. This includes premises, structures and grounds **you** acquire for **your** use as a private residence while this policy is in effect;

2) any part of a premises not owned by an **insured person** but where an **insured person** is temporarily living;

3) cemetery plots or burial vaults owned by an **insured person**;

4) land owned by or rented to an **insured person** where a single-family dwelling is being built as that person's residence;

5) any premises used by an **insured person** in connection with the **residence premises**; and

6) any part of a premises occasionally rented to an **insured person** for other than **business** purposes.

7. **Occurrence** - means an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in **bodily injury** or **property damage**.

8. **Property damage** - means physical injury to or destruction of tangible property, including loss of its use resulting from such physical injury or destruction.

9. **Residence employee** - means an employee of an insured person while performing duties arising out of and in the course of employment in connection with the maintenance or use of **your residence premises**. This includes similar duties performed elsewhere for an **insured person**, not in connection with the **business** of an **insured person**.

10. **Residence premises** - means the **dwelling**, other structures and land located at the address stated on the Policy Declarations.

11. **Roof surface** - means the roof surface material type (slate, composition, wood, tile, metal, all other roof surface material types) of a **building structure** or other structure covered under **Dwelling Protection-Coverage A or Other Structures Protection-Coverage B** and all other roofing components, including, but not limited to:

- a) flashing, caps, vents, drip edges, and ice shields;
- b) sheeting, felt and membranes;

- c) modified bitumen, bitumen, rubber, built-up and sprayed polyurethane foam roofing;
- d) foam inserts and elastomeric coating;
- e) finials, eave and gable trim and snow guards;
- f) battens, counter battens, bird stops, gravel stops;

and

- g) coatings, adhesives, adherents and other finishing materials for roof surface materials and all other roofing components.

12. **We, us, or our** - means the company named on the Policy Declarations.

13. **Windstorm** - means wind with or without precipitation.

14. **You or your** - means the person listed under Named Insured(s) on the Policy Declarations as the insured and that person's resident spouse.

Insuring Agreement

In reliance on the information **you** have given **us**, **we** agree to provide the coverages indicated on the Policy Declarations. In return, you must **pay** the premium when due and comply with the policy terms and conditions, and inform us of any change in title, use or occupancy of the **residence premises**.

Subject to the terms of this policy, the Policy Declarations shows the location of the **residence premises**, applicable coverages, limits of liability and premiums. The policy applies only to losses or **occurrences** that take place during the policy period. The Policy Period is shown on the Policy Declarations. This policy is not complete without the Policy Declarations.

This policy imposes joint obligations on the Named Insured(s) listed on the Policy Declarations and on that person's resident spouse. These persons are defined as **you or your**. This means that the responsibilities, acts and omissions of a person defined as **you or your** will be binding upon any other person defined as **you or your**.

This policy imposes joint obligations on persons defined as an **insured person**. This means that the responsibilities, acts and failures to act of a person defined as an **insured person** will be binding upon another person defined as an **insured person**.

* * *

Section II - Family Liability and Guest Medical Protection

Family Liability Protection - Coverage X

Losses We Cover Under Coverage X:

Subject to the terms, conditions and limitations of this policy, **we** will pay damages which an **insured person** becomes legally obligated to pay because of **bodily injury** or **property damage** arising from an **occurrence** to which this policy applies, and is covered by this part of the policy.

We may investigate or settle any claim or suit for covered damages against an **insured person**. If an **insured person** is sued for these damages, **we** will provide a defense with counsel of **our** choice, even if the allegations are groundless, false or fraudulent. **We** are not obligated to pay any claim or judgment after **we** have exhausted **our** limit of liability.

Losses We Do Not Cover Under Coverage X:

1. **We** do not cover any **bodily injury** or **property damage** intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any **insured person**. This exclusion applies even if:

- a) such **insured person** lacks the mental capacity to govern his or her conduct;
- b) such **bodily injury** or **property damage** is of a different kind or degree than intended or reasonably expected;
- or
- c) such **bodily injury** or **property damage** is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether such **insured person** is actually charged with, or convicted of, a crime.

2. **We** do not cover **bodily injury** to an insured person or property damage to property owned by an **insured person** whenever any benefit of this coverage would accrue directly or indirectly to an **insured person**.

* * *

12. We do not cover **bodily injury** or **property damage** arising out of the past or present **business** activities of an insured person.

We will not apply this exclusion to **bodily injury** or **property damage** arising from the occasional or part-time **business** activities of an **insured person** who is a student under 21 years of age who is self-employed and has no employees.

13. We do not cover **bodily injury** or **property damage** arising out of any premises, other than an **insured premises**, owned, rented or controlled by an **insured person**. We will not apply this exclusion to **bodily injury** to a **residence employee**.

14. We do not cover **property damage** to property rented to, occupied or used by, or in the care of, an **insured person**. We will not apply this exclusion if the **property damage** is caused by fire, explosion or smoke.

15. We do not cover any liability an **insured person** assumes arising out of any contract or agreement.”

Allstate issued an APC509 Home Day Care Coverage–Coverage DC Endorsement which provides, in pertinent part:

“For an additional premium and when the Policy Declarations indicates that **Home Day Care Coverage** applies, the coverages of your policy are extended to apply to the home day care **business** conducted by an **insured person** at the **residence premises**. All changes to **your** policy as provided by this endorsement apply to **Home Day Care Coverage** only.

Under Section I–Your Property:

A. If the home day care **business** is conducted in an unattached **building structure** at the address stated on the Policy Declarations, we will cover that structure under **Other Structures Protection-Coverage B**. This provision does not apply to Renters or Condominium Owners policies.

B. Under **Personal Property Protection-Coverage C, Limitations On Certain Personal Property**, the limits on

property used or intended for use in a **business**, do not apply to property used in connection with a home day care business conducted by an **insured person** at the **residence premises**.

Under Section 11-Family Liability and Guest Medical Protection:

Family Liability Protection-Coverage X and Guest Medical Protection-Coverage Y apply to **bodily Injury** and **property damage** arising out of the operation of a home day care business by an insured person at the residence premises for which the **Insured person** receives monetary or other compensation.

A. Under **Losses We Do Not Cover Under Coverage X**, items 11 and 12 do not apply to this coverage.

B. Under **Losses We Do Not Cover Under Coverage X**, the following exclusions are added:

22. **We** do not cover bodily injury or **property damage** arising out of sexual molestation, corporal punishment or physical or mental abuse inflicted upon any person by or at the direction of an **insured person** an employee of an **insured person** or any other person involved in any capacity in the home day care **business**.

23. **We** do not cover **bodily Injury** or **property damage** occurring at the **residence premises** and arising out of the ownership, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of:

- a) draft or saddle animals;
- b) vehicles used with such animals;
- c) motorized land vehicles; or
- d) watercraft

by an Insured person or employee in the home day care **business**.

24. **We** do not cover **bodily injury** to any employee of an **insured person** arising out of the home day care **business**. This does not apply to **bodily injury** to a **residence employee**.

C. Under **Losses We Do Not Cover Under Coverage Y**, items 9, 10, and 11 do not apply to this coverage.

D. Under **Losses We Do Not Cover Under Coverage Y**, the following exclusions are added:

17. We do not cover **bodily injury** arising out of sexual molestation, corporal punishment or physical or mental abuse inflicted upon any person by or at the direction of an **insured person**, an employee of an **insured person** or any other person involved in any capacity in the home day care **business**.

18. We do not cover **bodily injury** occurring at the **residence premises** and arising out of the ownership, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of:

- a) draft or saddle animals;
- b) vehicles used with such animals;
- c) motorized land vehicles; or
- d) watercraft

by an **insured person** or employee in the home day care **business**.

19. We do not cover **bodily injury** to any employee of an **Insured person** arising out of the home day care business. This does not apply to **bodily injury** to a **residence employee**.

E. Under **Section II Conditions, item 4, Our Limits Of Liability** is replaced by the following:

4. **Our Limits Of Liability**

Regardless of the number of **insured persons**, injured persons, claims, claimants or policies involved, our total liability under **Family Liability Protection Coverage X** for damages resulting from one occurrence will not exceed the limit shown on the Policy Declarations. All **bodily injury** and **property damage** resulting from one accidental loss or from continuous or repeated exposure to the same general conditions is considered the result of one occurrence.

Our total liability under **Guest Medical Protection Coverage Y**, for all medical expenses payable for **bodily injury** to any one person, shall not exceed the "each person" limit shown on the Policy Declarations for **Coverage Y**.

Regardless of the number of **occurrences, insured persons, injured persons**, claims or claimants involved, the most **we** will

pay for all losses under **Home Day Care Coverage** occurring in any one policy period for **Family Liability Protection-Coverage X and Guest Medical Protection-Coverage Y** combined, will not exceed the "total aggregate limit" shown on the Policy Declarations for **Home Day Care Coverage—Coverage DC**.

All other policy terms and conditions apply.”

Allstate issued an AVP189 Oregon Amendatory Endorsement which provides, in pertinent part:

“I. In the **General** section of the policy, the following changes are made:

A. Under **Definitions Used In This Policy** the following definition has been replaced:

You or your—means the policyholder named in the Policy Declarations and that policyholder’s resident spouse or resident partner as defined by the Oregon Family Fairness Act of 2007.”

III. CLAIM FOR DECLARATORY RELIEF

11. Allstate realleges and incorporates herein by reference the allegations in the preceding paragraphs of this Complaint.

12. A justiciable controversy exists between the parties hereto. This controversy can be resolved by this Court through entry of its Judgment declaring the rights and liabilities of the parties alleged herein under the contracts of insurance alleged above. Allstate requests appropriate declaratory relief to establish its rights under the policy.

13. There is no coverage available under the Allstate policy for the following reasons:

13.1 The allegations of the Complaint do not state a claim for any potentially covered “occurrence” under the policy.

13.2 The alleged acts of Gage Kapon-Ray Geer constitute intentional and criminal acts or omissions of an insured person and are excluded from coverage.

13.3 The policy's Joint Obligations Clause bars coverage. The terms of the policy impose joint obligations on persons defined as an insured person, which means that the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person defined as an insured person.

13.4 The provisions of the Home Day Care Coverage-Coverage DC Endorsement bar coverage under the policy. The Daycare endorsement excludes sexual misconduct, physical abuse and corporal punishment.

13.5 There is no coverage for the personal injury torts for false imprisonment and invasion of rights of privacy. These claims do not constitute defined "bodily injury" or "property damage."

13.6 There is no coverage for claims alleged that do not constitute defined "bodily injury" or "property damage,"

14. Allstate requests that the Court enter a Judgment herein wholly in favor of Allstate declaring, adjudicating, and decreeing that Allstate is not obligated to provide coverage, indemnification, or a defense to Defendants Terry Lopes dba A Maui Mom Childcare & Pre-School, A Maui Mom Childcare and Pre-School, LLC, and Gage Kapon-Ray Geer on the claims alleged in the Multnomah County Circuit Court Complaint filed by K.B., Guardian Ad Litem of J.B and A.B.

WHEREFORE, Allstate prays for relief as follows:

A. For a Declaration by this Court that Allstate is not obligated to provide coverage, indemnification, or a defense to Defendants Terry Lopes dba A Maui Mom Childcare & Pre-School, A Maui Mom Childcare Preschool, LLC, and Gage Kapon-Ray Geer on the claims alleged in the Multnomah County Circuit Court Complaint filed by K.B.,

Guardian Ad Litem of J.B and A.B., and that the Guardian Ad Litem K.B is not entitled to recover anything under the policy.

B. For costs and such other and further relief as this Court deems just and equitable.

DATED this 21st day of September, 2017.

DOUGLAS FOLEY & ASSOCIATES, PLLC

By /s/ DOUGLAS F. FOLEY
Douglas F. Foley, OSB #802262
Attorneys for Allstate Vehicle and Property
Insurance Company